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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

HABEAS CORPUS RESOURCE CENTER,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

and

MICHAEL B. MUKASEY, in his official capacity
as United States Attorney General,

Defendants.

Case No. C 08-02649

FIRST AMENDED COMPLAINT

Administrative Procedure Act Case

PRELIMINARY STATEMENT¹

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. section 552, the Administrative Procedure Act (APA), 5 U.S.C. sections 551-59 and 701-06, and the United States Constitution for injunctive and other relief. It seeks to set aside Defendants' Final Rule regarding Certification of State Capital Counsel Systems, 73 Fed. Reg. 75,327 (Dec. 11, 2008), or postpone the effective date of the Final Rule pending resolution of issues regarding Defendants' disclosure of requested public records, compliance with notice requirements and accommodation of public

¹ This Court authorized the filing of this Amended Complaint in the Case Management Order, filed September 24, 2008 (authorizing Plaintiff to file an Amended Complaint within fourteen days of the publication of Defendants' Final Rule).

1 comment on critical issues, justification for the Final Rule and response to public comments, and
2 implementation of measures to ensure the promulgation of regulations free from conflicting interests,
3 political considerations, and unlawful bias in favor of state prosecution interests. This action also
4 seeks adequate searches, processing, and release of agency records Plaintiff has requested from
5 Defendants.

6 2. The Antiterrorism and Effective Death Penalty Act of 1996 added Chapter 154 to Title
7 28 of the United States Code (Chapter 154) to provide procedural incentives in federal review of state
8 capital convictions to states that guarantee death-sentenced prisoners the appointment and
9 compensation of competent counsel and reasonable litigation resources necessary to develop
10 constitutional claims in state habeas proceedings. Chapter 154 was modeled on the recommendations
11 of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, often referred to as the Powell
12 Committee, which identified the “pressing need for qualified counsel to represent inmates in
13 collateral review” as one of the most serious obstacles to the resolution of capital post-conviction
14 litigation. Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report, 135
15 Cong. Rec. S13471-04, S13482 (1989). To address this deficiency, Congress enacted Chapter 154 to
16 provide a “quid pro quo arrangement under which states are accorded stronger finality rules on
17 federal habeas review in return for strengthening the right to counsel for indigent capital defendants.”
18 House Comm. on the Judiciary, Effective Death Penalty Act of 1995, H.R. Rep. No. 104-23, at 16
19 (1995).

20 3. The USA PATRIOT Improvement and Reauthorization Act of 2005 (Patriot Act)
21 included provisions to amend Chapter 154. Whereas federal courts previously determined a state’s
22 eligibility under Chapter 154, the Patriot Act amendments placed authority for certifying a state
23 mechanism’s compliance with Chapter 154, and entitlement to its “fast-track” federal review, with
24 the United States Attorney General. The Patriot Act amendments also directed the Attorney General
25 to promulgate regulations to implement this certification process in accordance with the provisions of
26 the APA. Although the Patriot Act amendments altered some provisions of Chapter 154 – such as
27 removing a requirement that the state mechanism be contained in a statute, rule of court, or agency
28 rule – they left intact the critical requirements that states appoint and compensate competent counsel

1 and provide reasonable litigation expenses for indigent death-sentenced individuals.

2 4. On June 6, 2007, former Attorney General Alberto Gonzales published Proposed
3 Regulations to govern the process for, and set forth the criteria to be used in, certification
4 determinations. Certification Process for State Capital Counsel Systems, Notice of Proposed
5 Rulemaking, 72 Fed. Reg. 31,217 (June 6, 2007) (NPRM or Proposed Regulations).

6 5. Plaintiff submitted a FOIA request on July 18, 2007, for records related to Defendants'
7 promulgation of the Proposed Regulations. In particular, Plaintiff sought information that
8 Defendants considered in the development of the regulations and information regarding potential
9 conflicts of interests by the Department of Justice staff responsible for the regulations.

10 6. Because Plaintiff's request sought information necessary to an adequate evaluation of,
11 and participation in, the rule making at issue, Plaintiff asked Defendants to postpone the rule making
12 until they disclosed the responsive records. In the alternative, Plaintiff requested that Defendants
13 permit public comment on the Proposed Regulations after they disclosed the responsive records.
14 Defendants rejected these requests and instead published the Final Rule on December 11, 2008,
15 which is scheduled to become effective on January 12, 2008. *See* Certification of State Capital
16 Counsel Systems, Final Rule, 73 Fed. Reg. 75,327 (Dec. 11, 2008) (Final Rule).

17 7. The Proposed Regulations generated considerable public comment that raised
18 significant concerns about fairness in the manner in which the Attorney General created the Proposed
19 Regulations and their failure to ensure a just process for resolving the critical determination of
20 whether a state is entitled to expedite and truncate federal review of constitutional claims brought by
21 death-row inmates. A key focus of the over 100,000 comments was the expectation that the Attorney
22 General's regulations must provide minimum standards and definitions to implement the Chapter 154
23 requirements. In support of these arguments, commenters pointed to several sources of relevant
24 legislative history, including the many existing judicial interpretations of Chapter 154 requirements
25 unaltered by the Patriot Act amendments. Comments by members of Congress, the Judicial
26 Conference of the United States, and a group of legal ethics professors and professional responsibility
27 lawyers from across the country, among others, raised additional concerns about the fairness of the
28 Proposed Regulations, their failure to provide procedural protections, and the Attorney General's

1 “impossible conflict of interest” in implementing certification proceedings.

2 8. Although the public comments included thousands of pages of complex legal and
3 practical problems associated with the Proposed Regulations, Defendants’ responses were either
4 conclusory or provided no rational and defensible bases for Defendants’ refusal to alter the Final
5 Rule. Indeed, despite substantial constitutional and other serious problems raised during the public
6 comment period, the Final Rule is nearly identical to the Proposed Regulations.

7 9. In their Final Rule, Defendants explain for the first time their belief that the Patriot Act
8 amendments to Chapter 154 required the Attorney General to implement certification by invalidating
9 existing judicial interpretations of Chapter 154 and eschewing any application of those existing
10 decisions in its certification determinations. Moreover, Defendants further stated for the first time
11 that the burden of creating standards and defining the operative terms for Chapter 154 eligibility lay
12 solely within the discretion of the individual states. Although members of the Senate Judiciary
13 Committee had asked Defendants to respond to a number of questions about their approach to the
14 rule making prior to finalizing the Proposed Regulations, Defendants provided those answers only
15 after the Final Rule had been submitted for publication, thus further ensuring that no notice was given
16 about Defendants’ controversial interpretations.

17 10. Defendants’ unlawful failure to provide notice of critical interpretations of the Patriot
18 Act amendments and their role in the certification process deprived Plaintiff and the public of an
19 opportunity to comment meaningfully on Defendants’ rule making. Defendants’ failure to comply
20 with their duty to provide notice of these controversial and unlawful interpretations of the Patriot Act
21 amendments deprived Plaintiff and other interested parties, including members of Congress, of the
22 opportunity to submit comments raising constitutional and other legal impediments to Defendants’
23 misguided interpretation of the law.

24 11. In spite of the sweeping changes to certification requirements and the dramatic
25 alteration to Chapter 154’s scheme that they imposed, Defendants also unlawfully claimed for the
26 first time in their Final Rule that certification is a limited ministerial function with no bearing on the
27 future conduct of state actors or on the interpretation of law or policy. Defendants also eliminated in
28 the Final Rule the only procedural safeguard that had been established in the Proposed Regulations:

1 a requirement that certification may not apply when a state mechanism changes in a manner that
2 affects its compliance with Chapter 154.

3 12. Defendants did not provide any notice of these highly controversial and potentially
4 unconstitutional interpretations and changes to existing law and thus prevented public comment on
5 them. The politically and legally extreme nature of the Final Rule also confirms the influence of
6 significant bias that has concerned large segments of the public since the initiation of this rule making
7 process.

8 13. In response to many serious concerns about institutional and individual bias,
9 Defendants concealed and deliberately misled the public about the substantial role of the Department
10 of Justice Criminal Division in the promulgation of the certification regulations and the
11 implementation of certification in the Department of Justice. When a supervising official responsible
12 for developing the regulations proposed answering a Congressional inquiry by identifying the
13 Criminal Division as one of two offices with whom he would “work closely” on the regulations, he
14 was admonished by another official who stated that the Criminal Division should not be mentioned
15 specifically because “doing so might invite attacks that, e.g., it is inappropriate to involve the
16 Criminal Division in developing standards/procedures regarding the adequacy of state capital defense
17 systems.” In keeping with this concern, there was no mention of the Criminal Division in the
18 Proposed Regulations, although the Final Rule now lists it as the responsible component for further
19 inquiries. Defendants also concealed from the public the specific bias and conflict of interests of the
20 individual members of the working group that developed the regulations.

21 14. Moreover, a member of the Capital Case Unit assigned to the working group that
22 developed the Proposed Regulations recommended and implemented procedures designed to conceal
23 the pervasive and on-going role that state attorneys general had in the development of the Proposed
24 Regulations, including steps to prevent interested parties from discovering ex parte communications
25 that state attorneys general had with the Department of Justice.

26 15. Finally, in justifying the Final Rule, Defendants simply ignored many important
27 comments on the numerous troubling issues that *were* apparent from the NPRM and carried out the
28

rule making in an arbitrary and unconstitutionally biased manner.²

JURISDICTION AND VENUE

16. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. sections 552 (a)(4)(A)(vii) and (a)(4)(B). The Court also has jurisdiction pursuant to 28 U.S.C. section 1331 and 5 U.S.C. sections 701-06. Venue lies in this district under 5 U.S.C. sections 552 (a)(4)(B) and 703.

PARTIES

17. Plaintiff, the Habeas Corpus Resource Center (HCRC), is an agency in the Judicial Branch of the State of California. The HCRC provides legal representation to indigent men and women under sentence of death in state and federal habeas corpus proceedings and in executive clemency proceedings. The HCRC also is responsible for providing legal advice and developing resources on significant, recurring issues for use by appointed counsel in capital post-conviction proceedings. In addition to these duties, the HCRC works in conjunction with the California Supreme Court and other state agencies and actors to evaluate and contribute to rules and policies related to the representation of individuals sentenced to death.

18. Defendant Department of Justice (DOJ) is an agency within the meaning of 5 U.S.C. section 552 (f)(1) of the Executive Branch of the United States government. The following offices are components within DOJ: Office of Justice Programs; Office of Legal Counsel; Office of Legal Policy; Office of Legislative Affairs; Office of Intergovernmental and Public Liaison; Office of the Attorney General; Office of the Deputy Attorney General; Office of the Associate Attorney General; Criminal Division; Civil Division; Office of Attorney Recruitment and Management; Justice Management Division; and Office of Information and Privacy.

² At the time of the filing of this First Amended Complaint, state officials have declined to state whether they intend to apply for Chapter 154 certification after the Final Rule becomes effective. Inquiries about such intentions have been made to the Attorney General for the State of California on numerous occasions, but he has declined to provide any public indication whether he intends to do so, although a member of his staff participated in the development of the Proposed Regulations for the express purpose of ensuring that California would qualify for Chapter 154 certification under the Attorney General's regulations. Should the State of California or any other state announce an intention to seek the benefits of Chapter 154 pursuant to the Final Rule, numerous others legal issues will arise and Plaintiff may seek leave to file a Second Amended Complaint.

1 “mechanics” of the certification process in terms of public notice and comment. *Id.* at 31,218, 31,220
2 (Section 26.23).

3 24. The NPRM did not state or suggest in any way that the Attorney General believed that
4 the Patriot Act amendments to Chapter 154 altered the existing requirements for Chapter 154 or
5 changed the nature of the certification determination that previously had been made by the federal
6 courts. Instead, the NPRM noted that the requirements of Chapter 154 had been in place since the
7 enactment of the Antiterrorism and Effective Death Penalty Act of 1996. *Id.* at 31,217.

8 25. The NRPM established a sixty-day period for public comment on the Proposed
9 Regulations, with the deadline for comments set for August 6, 2007. Numerous members of the
10 public, including Plaintiff, submitted requests for an extension of time within which to evaluate the
11 propriety and effect of the Proposed Regulations. Senators Arlen Specter and Patrick Leahy of the
12 Senate Judiciary Committee also submitted a request for an extension of time to comment on the
13 Proposed Regulations, echoing public comments regarding the need for additional time to carefully
14 evaluate the Proposed Regulations and noting that “it is crucial that the legislative changes to this
15 complex and heavily litigated area of the law be successfully and appropriately implemented,
16 especially given the tremendous stake for individual defendants.” Letter from Senators Leahy and
17 Specter, Department of Justice docket no. DOJ-2007-0110-0077, submitted Aug. 2, 2007.

18 26. Following these requests, Defendants reopened the public comment period with a new
19 deadline of September 24, 2007, for the comments. Certification of State Capital Counsel Systems,
20 Notice of Proposed Rulemaking; Reopening of Comment Period, 72 Fed. Reg. 44,816 (Aug. 9,
21 2007). The notice repeated that the Department had “consulted with a number of groups in
22 developing this proposed rule,” describing these as “extensive consultations.” *Id.*

23 **Plaintiff’s FOIA Request**

24 27. Plaintiff submitted a FOIA request to the DOJ on July 18, 2007 (HCRC Request),
25 seeking information related to the Proposed Regulations from eight components of the DOJ: Office
26 of Justice Programs; Office of Legal Counsel; Office of Legal Policy; Office of Legislative Affairs;
27 Office of Intergovernmental and Public Liaison; Office of the Attorney General; Office of the Deputy
28 Attorney General; and Office of the Associate Attorney General.

1 28. Plaintiff also requested and is entitled to a waiver of processing fees pursuant to 5
2 U.S.C. section 552(a)(4)(A)(iii) and corresponding agency regulations because the request was made
3 for information in the service of the public interest and was not sought for commercial purposes.

4 29. The HCRC Request sought information about individuals and entities that Defendants
5 consulted in the course of developing the Proposed Regulations and individuals within the DOJ
6 responsible for developing the Proposed Regulations. In addition, the HCRC Request sought
7 material related to the review of the Proposed Regulations by the Office of Management and Budget
8 (OMB) and by the Office of Information and Regulatory Affairs (OIRA). Plaintiff also sought
9 information about Defendants' hiring of Jennifer Goldstein, a former staff member to Representative
10 Dan Lungren, one of the sponsors of legislation similar to the Patriot Act amendments to the Chapter
11 154, and her immediate assignment as a primary person responsible for drafting the Proposed
12 Regulations.

13 30. The need for this information became apparent after Plaintiff began to learn of
14 apparently substantial consultations regarding the Attorney General's Proposed Regulations, both
15 before and after the NPRM, between the criminal prosecution components of DOJ and state
16 prosecution officials and organizations. In contrast, Defendants did not engage in similar
17 consultations with defense organizations, agencies, or individuals in any meaningful manner. Of
18 particular concern to Plaintiff were indications that components with responsibility for criminal
19 prosecution in the DOJ could have had a significant role in the Attorney General's rulemaking and
20 that substantial, disqualifying conflicts of interests exist. The fact that the Proposed Regulations
21 included factual examples that predetermined certification for some state mechanisms further
22 heightened the concern of impermissible bias. This concern was validated when later disclosures
23 revealed that one state capital prosecutor indicated that he worked with a Department of Justice
24 official to ensure that examples in the Proposed Regulations were closely directed to address his
25 state's mechanism.

26 31. Former Attorney General Alberto Gonzales, who was responsible for developing the
27 Proposed Regulations, has been publicly implicated as the source of a number of actions and policies
28 of the DOJ that are ethically and legally problematic. The Final Rule was issued by Defendant

1 Michael B. Mukasey, who has acknowledged his obligation to eliminate the effect of any ethically or
2 legally questionable policies and/or procedures carried out by his predecessor.

3 32. The information Plaintiff sought in the HCRC Request was necessary to evaluate the
4 Proposed Regulations meaningfully and, if appropriate, articulate its concerns during the public
5 comment period. The information also is necessary to evaluate the Final Rule in a timely manner –
6 i.e., before it goes into effect and allows Defendants to conduct certification proceedings that
7 determine issues literally of life and death – and ensure that the Final Rule does not perpetuate
8 serious conflicts of interests or biases that may have affected the Proposed Regulations under the
9 former Attorney General.

10 **Responses to the HCRC Request and Other Department of Justice Communications**

11 33. Defendants divided responsibility for responding to the HCRC Request among three
12 offices within the DOJ: the Office of General Counsel was responsible for responding for the Office
13 of Justice Programs (OJP Response); the Office of Legal Counsel was responsible for responding
14 directly (OLC Response); and the Office of Information and Privacy was responsible for responding
15 on behalf of the remaining six components.

16 34. The responding components did not comply with the statutory time limits imposed by
17 the FOIA and failed to timely respond to the HCRC Request. Prior to the initiation of this lawsuit,
18 Defendants disclosed only five pages of responsive material.

19 35. Plaintiff timely appealed Defendants' responses to its request, seeking adequate and
20 complete searches to locate additional responsive material. All administrative appeals have been
21 exhausted.

22 36. Disclosures made pursuant to this litigation have revealed the role of the Criminal
23 Division as one of the primary influences in the development of the regulations, as well as
24 Defendants' efforts to conceal that fact from the public. Disclosures also demonstrate that individual
25 members of the working group to develop the regulations, including Margaret Griffey, Richard
26 Broughton, and Jennifer Goldstein, had conflicts of interests and significant bias in developing the
27 regulations. These conflicts included statements of prejudgment on certification issues, personal and
28 substantial participation in prior litigation regarding state compliance with Chapter 154 on behalf of

1 potential parties to certification proceedings and personal and substantial participation in state capital
2 habeas cases that will be affected by certification determinations.

3 37. Disclosures also establish that Defendants' consultation with defense interests involved
4 one meeting with three individuals representing a single national defense organization, and that other
5 than a consultation with the American Bar Association, all other consultations, including those
6 Defendants' identified as consultations with representatives of state officials, were with state
7 prosecutors and prosecution organizations.

8 38. Following the publication of the Proposed Regulations, Defendants had unlawful ex
9 parte communications with interested prosecutors, including at least a meeting with the National
10 Association of Attorneys General and a conversation with officials from the Nevada Attorney
11 General's Office to discuss the proposed regulations. Indeed, Defendants cite comments that never
12 were made public as justifications for some of the changes to the Final Rule that favor prosecution
13 interests.

14 39. Throughout the promulgation of the regulations, Defendants were under pressure from
15 Senator Kyl of Arizona and Representative Lungren of California to issue final regulations that
16 would allow their states to become certified under Chapter 154.

17 **Plaintiff's Interest in the Attorney General's Regulations**

18 40. The Regulations will determine the procedures and standards by which the Attorney
19 General certifies states for expedited review of state death penalty convictions and sentences in
20 federal habeas corpus proceedings. The provisions of Chapter 154 require qualifying state
21 mechanisms for the appointment and compensation of state post-conviction counsel in death penalty
22 cases to assure timely appointment of competent counsel, adequate compensation, and reasonable
23 expenses for the development and presentation of all potentially meritorious claims of constitutional
24 error in state court proceedings. A certification determination based on biased, incomplete, and/or
25 inaccurate information that erroneously portrays state compliance when it does not exist
26 fundamentally undermines the goals and purposes of Chapter 154 and violates existing judicial rules
27 regarding its provisions and legislative history.
28

1 41. Such errors during certification ultimately deprive indigent capital habeas corpus
2 petitioners of their rights under the Due Process and Equal Protection clauses of the United States
3 Constitution, and to appropriate federal judicial review of their capital convictions and death
4 sentences.

5 42. Plaintiff has a significant interest in the Final Rule. In keeping with this interest,
6 Plaintiff participated in the public comment period for the Proposed Regulations and submitted
7 timely comments to Defendants in order to raise substantial concerns with the Regulations as
8 proposed.

9 43. Plaintiff's comments to the Proposed Regulations advised Defendants that DOJ's
10 failure to disclose information sought by the HCRC Request deprived Plaintiff of adequate notice and
11 opportunity to participate in the public comment period and violated due process requirements for
12 agency decision making. Plaintiff's comments also asked the Attorney General to avoid these
13 unlawful results either by withdrawing the Proposed Regulations or extending the public comment
14 period until the DOJ disclosed information sought by the HCRC Request.

15 44. Specifically, Plaintiff addressed in its comments to Defendants the following issues
16 related to the Proposed Regulations and public comment period:

- 17 A. Interested members of the public are entitled to a meaningful opportunity to
18 communicate relevant information, concerns, and criticisms during the public
19 comment period;
- 20 B. Sufficient notice of issues to be addressed during the rulemaking is necessary to
21 meaningful participation in the public comment period;
- 22 C. Sufficient notice includes information about the Attorney General's methodology in
23 developing proposed regulations and the reasoning that led to the proposed rule;
- 24 D. Sufficient notice includes public disclosure of the information upon which the
25 Attorney General relied in reaching the decisions to propose particular rules;
- 26 E. Interested members of the public are entitled to evaluate whether there is a rational
27 connection between the proposed regulations and the statutory scheme and whether
28 the proposed regulations offer a logical means of implementing that scheme;

1 F. The particular relevance of requested information to adequate notice and informed
 2 participation in the public comment period given the unavoidable conflicts of
 3 interests inherent in the Attorney General certifying states' mechanisms while also
 4 acting as the chief prosecutor for the United States; and

5 G. The particular relevance of requested information to adequate notice and informed
 6 participation in the public comment period given the evidence of undisclosed ex parte
 7 consultations before and after the publication of the proposed Regulations between
 8 interested state prosecutors and the Attorney General responsible for developing the
 9 proposed Regulations.

10 45. Defendants declined to take action to remedy the issues raised by DOJ's failure to
 11 disclose information sought by the HCRC Request as described in Plaintiff's comments.

12 **Defendants' Final Rule**

13 46. In rejecting the numerous comments that raised the need for the Attorney General's
 14 regulations to contain minimum standards and definitions for certification requirements, Defendants
 15 stated that amendments to Chapter 154 were intended to (1) invalidate federal court interpretations of
 16 the statutory terms and requirements of Chapter 154, including those unchanged by the Patriot Act
 17 amendments, and (2) leave specification of any standards and definitions of Chapter 154
 18 requirements to the discretion of individual states.

19 47. In publishing the Final Rule, Defendants did not respond to the comments that
 20 presented the constitutional violations that result should Defendants disregard the conclusive effect of
 21 the judgments of Article III courts. Defendants also ignored comments that their refusal to define key
 22 statutory terms rendered the regulations impermissibly vague and standardless and failed to comply
 23 with the statutory directive to implement certification procedures. Although many comments pointed
 24 out that the examples in the Proposed Regulation demonstrated prejudgment of state certification,
 25 Defendants did not respond to these comments, or those that raised additional conflicting interests
 26 created by Defendants' joint projects and legal relationships with state prosecutors in dozens of
 27 capital cases.

28 48. Defendants justified their interpretations of the Patriot Act amendments by reference to

1 two sources: a provision that the requirements of certification are those “expressly stated” in Chapter
2 154, and the views of two Arizona legislators, Senator Kyl and Representative Flake, on certification.
3 This approach is contrary to the authoritative and relevant legislative history and controlling judicial
4 interpretations of Chapter 154 and raises serious constitutional and other legal problems with the
5 Final Rule.

6 49. In response to the many comments raising serious deficiencies in procedural
7 protections and regularity in the certification proceedings, Defendants claimed that the certification
8 determination was not a regulatory action governed by rule making procedures, but an adjudication
9 akin to licensing with no interpretation of law or policy or impact on future conduct. Defendants also
10 eliminated in the Final Rule a previous requirement that certification may not apply when a state
11 mechanism changes in a manner that affects its compliance with Chapter 154.

12 50. Defendants did not respond to comments regarding a number of specific procedural
13 necessities in certification proceedings, such as the need for interested parties to submit information
14 to the Attorney General under seal during the certification proceeding. Defendants also ignored
15 comments regarding the intertwined issues of interested persons needing sufficient time for comment
16 on certification and the regulation’s deficient notice of a state application to death-sentenced inmates.
17 Although in many states the constitutional and/or statutory duties of the state Attorney General do not
18 authorize that official to seek Chapter 154 certification on behalf of the state, Defendants did not
19 respond to comments that raised the preemption of such state laws by the Attorney General’s
20 designation of the state Attorney General as the appropriate state official to apply for certification.

21 51. Had Defendants complied with their obligations to provide adequate notice and
22 opportunity to comment on their development of the Proposed Regulations and the Final Rule and
23 their legal positions provided in the first instances in the publication of the Final Rule, Plaintiff would
24 have submitted substantial comments addressing the inappropriate and unlawful positions taken by
25 Defendants.

26 52. Given Defendants’ disregard for the required constitutional protections and goals of
27 Chapter 154, the Final Rule is nearly certain to allow certification of states that do not provide
28 competent counsel and adequate resources for postconviction representation. Moreover, Defendant’s

1 unduly limiting interpretation of Chapter 154's requirements undoubtedly will result in states
2 frivolously submitting certification applications in hopes of qualifying for Chapter 154, or at least
3 forcing death-sentenced inmates to comply with Chapter 154's provisions for fear that the Attorney
4 General of the United States will incorrectly certify non-qualifying state mechanisms. The threat of
5 this improper certification combined with its retroactive reach renders the effect of the Final Rule on
6 Plaintiff, its clients, and the public interest, particularly grave. Given the economic crisis that grips
7 California and many other states, the degree of proactive litigation necessary to protect the rights of
8 death-sentenced individuals from the unlawful application of Chapter 154 under the Attorney
9 General's Final Rule will substantially tax the resources not only of Plaintiff, but also of the state and
10 federal courts that will handle the litigation and face significant legal uncertainty, including questions
11 about the management of their caseloads and dockets. Plaintiff also will be forced to make decisions
12 about protecting its clients during this period of legal chaos at the risk of foregoing full development
13 and presentation of constitutional claims of error to which those clients are entitled, and on which
14 their lives depend.

15 53. Plaintiff therefore seeks invalidation of the Final Rule due to bias in the development of
16 the regulations, Defendants' failure to provide notice and allow for public comment on numerous
17 critical issues central to the flawed rule making, and Defendants' failure to state rational bases for the
18 Final Rule by responding to significant public comments about its unconstitutional and unlawful
19 interpretation of Chapter 154, among other problems. Plaintiff also seeks the information to which it
20 is entitled under the FOIA, and that is required for Plaintiff's meaningful evaluation of Defendants'
21 Final Rule and subsequent phases of its development and implementation.

22 54. Defendants' refusal to disclose records responsive to the HCRC Request, address
23 Plaintiff's administrative appeals, remedy obstacles to Plaintiff's participation in Defendants' rule
24 making, provide sufficient public notice and comment, and eliminate the effects of bias in the rule
25 making and certification determinations is unlawful.
26
27
28

CAUSES OF ACTION

FIRST CAUSE OF ACTION:

**Violation of the Freedom of Information Act for Failure to
Make Responsive Records Available**

55. Plaintiff repeats and realleges paragraphs 1-54.

56. Defendants' failure to disclose records responsive to Plaintiff's request violates the FOIA, 5 U.S.C. section 552(a)(3).

SECOND CAUSE OF ACTION:

**Violation of the Administrative Procedure Act for Failure to
Make Responsive Records Available**

57. Plaintiff repeats and realleges paragraphs 1-54.

58. Defendants' failure to disclose records responsive to Plaintiff's request constitutes agency action unlawfully withheld and is arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law in violation of the Administrative Procedure Act.

THIRD CAUSE OF ACTION:

**Violation of the Freedom of Information Act for Failure to
Make A Reasonable Effort to Search for Records Responsive to Plaintiff's Request**

59. Plaintiff repeats and realleges paragraphs 1-54.

60. Defendants' failure to make a reasonable effort to search for records responsive to the HCRC Request violates the FOIA, 5 U.S.C. section 552(a)(3).

FOURTH CAUSE OF ACTION:

**Violation of the Administrative Procedure Act for Failure to
Make A Reasonable Effort to Search for Records Responsive to Plaintiff's Request**

61. Plaintiff repeats and realleges paragraphs 1-54.

62. Defendants' failure to make a reasonable effort to search for records responsive to the HCRC Request constitutes agency action unlawfully withheld and unreasonably delayed and is arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law in violation of the APA.

FIFTH CAUSE OF ACTION:

**Violation of the Freedom of Information Act for Failure to
Timely Respond to Plaintiff's Appeals**

63. Plaintiff repeats and realleges paragraphs 1-54.

64. Defendants' failure to timely respond to Plaintiff's appeals of agency responses violates the FOIA, 5 U.S.C. section 552(a)(6)(A)(ii).

SIXTH CAUSE OF ACTION:

**Violation of the Administrative Procedure Act for Failure to
Timely Respond to Plaintiff's Appeals**

65. Plaintiff repeats and realleges paragraphs 1-54.

66. Defendants' failure to timely respond to Plaintiff's appeals of agency responses constitutes agency action unlawfully withheld and unreasonably delayed and is arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law in violation of the APA.

SEVENTH CAUSE OF ACTION:

**Violation of the Administrative Procedure Act for Failure to
Provide Adequate Notice and Opportunity to Participate in Defendants' Rulemaking**

67. Plaintiff repeats and realleges paragraphs 1-54.

68. Defendants' actions violated the Administrative Procedure Act, 5 U.S.C. section 553, by failing to provide the required notice and comment. Defendants prevented Plaintiff's meaningful participation in the rule making by failing to disclose public information requested by Plaintiff, give notice of important and controversial information central to the development of the regulations, and provide notice of and comment on significant changes to the Final Rule that were not apparent from the proposed rule. These actions and omissions unlawfully deprived Plaintiff and the public of sufficient notice of and ability to participate meaningfully in Defendants' rulemaking and are arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law, in violation of the APA.

EIGHTH CAUSE OF ACTION:

**Violation of the Due Process Clause of the United States Constitution for Failure to
Provide Adequate Notice and Opportunity to Participate in Defendants' Rulemaking**

69. Plaintiff repeats and realleges paragraphs 1-54.

70. Defendants' actions violated the Due Process clause of the United States Constitution by failing to provide sufficient notice and opportunity to present objections to their rule making. Defendants failed to disclose public information requested by Plaintiff, give notice of important and controversial information central to the development of the regulations, and provide notice of and ability to object to significant changes to the Final Rule that were not apparent from the proposed rule. These actions and omissions unlawfully deprived Plaintiff and the public of sufficient notice of and ability to participate meaningfully in Defendants' rulemaking in violation of Due Process.

NINTH CAUSE OF ACTION:

Violation of the Administrative Procedure Act for Failure to State Defendants' Bases and Justification for the Regulations by Responding to Significant Public Comments

71. Plaintiff repeats and realleges paragraphs 1-54.

72. Defendants' failure to respond to many public comments raising serious constitutional and other problems with the proposed regulations violates the APA, 5 U.S.C. section 553(c), and constitutes arbitrary and capricious agency action.

TENTH CAUSE OF ACTION:

Violation of the Due Process and Equal Protection Clauses of the United States Constitution for Bias in the Development of Defendants' Regulations

73. Plaintiff repeats and realleges paragraphs 1-54.

74. Defendants' bias in the development of regulations violates the Due Process and Equal Protection Clauses in the Fifth and Fourteenth amendments to the United States Constitution and renders Defendants' actions in promulgating the Final Rule contrary to constitutional rights and privileges in violation of the APA, 5 U.S.C. § 706 (2)(B).

REQUESTED RELIEF

Wherefore, Plaintiff prays that this Court:

1. Hold unlawful and set aside Defendants' Certification Process for State Capital Counsel Systems, Final Rule, 73 Fed. Reg. 75,327 (Dec. 11, 2008), for failing to comply with the requirements of the Administrative Procedure Act, 5 U.S.C. sections 551-59, 701-06 and/or the Due Process and Equal Protection clauses of the United States Constitution as alleged in Causes of Action

1 Seven through Ten. There exists an actual, present and justiciable controversy between Plaintiffs and
 2 Defendants concerning their rights and duties with respect to Defendants' actions described in those
 3 causes of action. Furthermore, this controversy is ripe for judicial decision, and declaratory relief is
 4 necessary and appropriate. 28 U.S.C. §§ 2201, 2202.

5 2. In the alternative, enjoin the effective date of the Final Rule until review of the
 6 lawfulness of Defendants' actions is completed, 5 U.S.C. § 705;

7 3. Enjoin further action on a Final Rule for the Certification Process for State Capital
 8 Counsel Systems until Defendants have disclosed the material sought by Plaintiff, allowed a
 9 reasonable time for public comment on newly disclosed issues, and considered and addressed those
 10 comments, 5 U.S.C. § 705;

11 4. Order Defendants immediately to complete thorough searches in all relevant
 12 components for the requested records and expeditiously to process all responsive records, 5 U.S.C. §
 13 552(4)(B);

14 5. Order Defendants to disclose all responsive records in their entirety, 5 U.S.C. §
 15 552(4)(B);

16 6. Enjoin Defendants from charging Plaintiff fees for the processing of the HCRC
 17 Request, 5 U.S.C. § 552(4)(A)(iii);

18 7. Award Plaintiff its costs and reasonable attorney's fees incurred in this action, 5
 19 U.S.C. § 552(4)(E); and

20 8. Grant such other relief as the Court may deem just and proper.

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 22 DATED: December 23, 2008

Respectfully submitted,

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 24 By: /s/ Michael Laurence

25 MICHAEL LAURENCE
 26 Habeas Corpus Resource Center
 27 Attorneys for Plaintiff
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